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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 952

VILLAGE OF MIDLOTHIAN, a municipal corporation,

Respondent,

vs.

VILLAGE OF ROBBINS, a municipal corporation,

Petitioner.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District And/Or To The Supreme Court Of Illinois.

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To The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States:

Your petitioner, Village of Robbins, a municipal corporation, respectfully prays that a writ of certiorari be issued from this Court to review the judgment of the Appellate Court of Illinois, First District, (from which a Petition For Leave To Appeal was denied by the Supreme Court of Illinois), entered in this cause.

OPINION BELOW.

No formal opinion was entered by the Circuit Court, Chancery Division, of Cook County.

The opinion of the Appellate Court of Illinois, First Division, is reported at 81 Ill. App. 2d 22, 225 N.E. 2d 651 and is attached hereto as Appendix A, pp. 1a-12a.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. The date of the judgment sought to be reviewed is March 10, 1967.

2. No petition for rehearing was filed but instead a timely Petition For Leave To Appeal was filed in the Supreme Court of Illinois which was denied, without opinion, on September 26, 1967. A Petition For Rehearing, taken by the Court as a Motion For Reconsideration was denied, without opinion, November 15, 1967.

3. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED FOR REVIEW.

Whether a decision of the Supreme Court of Illinois denying Leave To Appeal from a judgment of the Appellate Court of Illinois, First District, rescinding a contract on the ground of impossibility of performance, where that doctrine had not been invoked by Petitioner as a defense to a suit in chancery for a declaratory judgment to have the said contract declared null and void, when the contract provisions were unambiguous and there had been and still is more than substantial performance even under the contract as construed by the Court, amounts to a denial of due process and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Involved here are the Fourteenth Amendment to the Constitution of the United States, (Appendix B), Article II, Section 2, Constitution of the State of Illinois (Appendix B), 42 U.S.C. Section 1981, (Appendix C) and Chapter 111½ Sections 121a to 121o inclusive, Illinois Revised Statutes (1965) (Appendix D).

STATEMENT OF FACTS.

On July 8, 1953, petitioner, Village of Robbins, a municipal corporation, entered into a water supply contract with respondent, Village of Midlothian, a municipal corporation pertinent provisions of which were as follows:

1. Robbins agrees to sell to Midlothian, and Midlothian agrees to purchase from Robbins a supply of water, subject to the provisions hereof.

2. Midlothian agrees to use Robbins water exclusively during the period of this contract.

9. The supply of water to be furnished Midlothian by Robbins hereunder shall not exceed an annual average of 400,000 gallons per day and not to exceed 500,000 gallons in any one day, for a period of ten years (10), after which time a new annual average and maximum day requirement shall be determined.

10. This contract shall be in full force and continue in effect for a period of thirty (30) years from the date hereof.

11. Midlothian agrees not to resell or permit any water furnished hereunder to be used to supply any other municipality or any consumer of water located or residing outside the territorial limits of Midlothian, except those consumers now being furnished with water by Midlothian and except when Robbins has subsequently authorized such sale or furnishing of water by action of its Board of Trustees; and Robbins agrees not to sell or permit any water supplied by it to be used to supply any other

municipality or any consumer of water located or residing outside the territorial limits of Robbins, except those consumers now being furnished with water by Robbins and except when Midlothian has subsequently authorized such sale or furnishing of water by action of Midlothian's Board of Trustees, if such sale or supply of water by Robbins would impair Robbins' ability to provide Midlothian with the supply of water to which it is entitled under this contract, as limited under Paragraph 9 hereof. In the event Robbins enters into an agreement to furnish water to any consumer outside of the Village of Robbins which agreement will call for the sale of 100,000 gallons or more per year, Robbins shall give Midlothian at least thirty (30) days notice of its intention to supply such consumer.

On February 20, 1964, respondent filed its complaint in chancery seeking a declaratory judgment that the contract of July 8, 1953, was null and void because of impossibility of performance, and an injunction to restrain petitioner from attempting to enforce it. Issue was joined and the matter was referred to a Master in chancery to take proofs and report findings of fact and conclusions of law. Among other things the Master found:

> "4) At the time of entry into this contract both villages were using Chicago water. Blue Island ran a six inch main with Chicago water west from Western Avenue to Sacramento Avenue where Robbins connected with an eight inch line, which has been capped since 1953 and now does not extend all the way to the connection but terminates twenty feet from the end of the Blue Island line. Midlothian also connected to this line but has never capped its connection and it still runs an auxiliary line to the connection with the Blue Island line at Sacramento Avenue.

"6) Midlothian's projected population was grossly under estimated so that by 1962 Midlothian had a population of 8,749, more than 1,000 in excess of the projection of the estimated population of that Village for the year 1983 and by the time of trial 1964 the population of Midlothian had risen to 11,183, approximately 50% over the maximum estimated at the time of design of the Robbins water system by the engineer who recommended the installation of a twelve inch main.

"7) The water supply to Midlothian from Robbins became erratic when the population exceeded the estimated maximum population of that village and in 1962 no water was delivered to Midlothian on five days, in 1963 it was without water on nine days and for the first nine months of 1964 there was no water delivered for six days. On 400 days out of the two years, the amount of water delivered by Robbins to Midlothian was exceeded by the amount used by Midlothian.

"8) Midlothian advised Robbins of the inadequacy of the system, the City of Chicago having made an inspection of the Robbins system advised Robbins of its inadequacies and the State Department of Public Health on five occasions in this two year period called attention to the Village of Robbins to the inadequacies of its system and the danger of contamination of the water when the supply taken through the mains reduced the pressure to a low point.

"11) These actions did not result in a sufficient supply and Midlothian purchased the additional amount needed for its inhabitants from all sources available to it, including an average purchase ranging from 125,000 gallons per day to 162,000 gallons per day in 1964 from the City of Blue Island during those months when that City had a supply in excess of its own needs and purchasing additional amounts from the villages of Markham or Posen as supplies

were available and emergencies required their purchase.

"14) It is impossible at the present time for the Village of Robbins to supply to the Village of Midlothian all of the water needed by said plaintiff village for its present population."

On the basis of these findings of facts as well as others, the Master in Chancery concluded that the contract was null and void because of impossibility of performance and recommended that it be rescinded for that reason. Petitioner filed objections to the report before the Master and later, when the report was filed, the same objections as exceptions before the Court. After argument on the exceptions, the Court overruled them all, approved the Master's report in its entirety and entered a Decree in conformity with the Master's report and excused Midlothian from further performance under the contract because of impossibility of performance by Robbins.

On the hearing before the Master, Robbins introduced without objection evidence as to the average daily quantity of water that it had been supplying Midlothian (Dx2, ab 118-119) for the period January, 1962, to and including September 1964, which quantities ranged from a low of 268,032 gallons on a daily average in January 1962 to a high of 769,300 gallons on a daily average in September, 1964. During the 33 month period from January, 1962 to and including September, 1964 there were only seven months when the average daily sale of water to Midlothian did not exceed the 400,000 gallon maximum called for by Paragraph 9 by the contract and, with the exception of April and June 1962, those months were winter months. (Dx 2, ab 118-119).

An appeal was taken from the decree to the Appellate Court of Illinois, First District, which Court, after consideration of the briefs filed by both parties and after hearing oral arguments, affirmed the lower Court decree. There was no petition for rehearing filed, but instead a timely Petition For Leave to Appeal was filed in the Supreme Court of Illinois which was denied.

Likewise denied by the Supreme Court of Illinois was a Petition For Rehearing of the earlier denial of the Petition For Leave To Appeal, which was taken by the Court as a Motion For Reconsideration.

While not specifically labelled as such, the federal questions sought to be here reviewed were first argued in the Petition For Leave To Appeal at page 8 of that Petition in the following language:

> "Neither Midlothian nor Robbins at any time prior to 1962 considered the contract to be one requiring Robbins to furnish all of Midlothian's water needs, nor could they have reasonably given that construction to the contract expressing as clearly as it did the requirements of both parties thereunder. 'Moreover, Midlothian, by its own admission, never ceased to maintain a connection to the Blue Island water main. (A. 73, 75) We submit that for the Appellate Court to have construed the contract in the fashion that it has and to have affirmed that lower court decree in the face of the evidence of Robbins' performance under the contract is manifestly contrary to law and abhorrent to reason and justice. Because of the drastic nature of the ruling involved, the novel and unprecedented rule of law enunciated by the Appellate Court and the finality of its judgment it is imperative that this Court grant leave to appeal. We submit that an additional reason that this Court

should grant leave to appeal is to exercise its supervisory authority in this important matter."

The Supreme Court of Illinois denied Leave To Appeal.

Thereafter, Petitioner filed a timely Petition For Rehearing which the Court considered as a Motion for Reconsideration. In this Petition or Motion, Petitioner specifically urged the federal questions at page 6 in the following language:

> "Defendant believing as strongly as it did that this Court in the exercise of its supervisory power over the decisions of the Appellate Court of the State would undertake to review the decision here involved, especially in view of the prevailing law circumscribing the construction of contracts, could not anticipate that review would be denied. The matter at bar involves what defendant believes to be correction by this Court of an Appellate Court decision running counter to the law repeatedly enunciated by this Court. It now behooves defendant to respectfully suggest to the Court that its refusal to review under the circumstances indicated above, thereby allowing the Appellate Court decision to stand, deprives defendant of due process of law and the equal protection of the laws contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article II, Section 2 of the Constitution of the State of Illinois."

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

The denial by the Supreme Court of Illinois of Leave To Appeal was unanticipated.

The decision of the Appellate Court of Illinois, First District, was so patently arbitrary and contrary to the law regarding the construction and interpretation of contracts that petitioner, in reliance on the law as it had existed prior to this case and in reliance on the supervisory function of the State Supreme Court to correct decisions not adhering to settled principles of law, naturally expected that its state court of last resort would exercise its powers of review in this instance.

From petitioner's point of view, although the court decree lacked any basis in law, this case was in its inception a suit on a contract,—a fairly common proceeding,—both at the trial court level and in the Appellate Court,—up to its decision—and one without the usual overtones of federal questions more frequently found in cases involving the construction of state statutes or their application in cases arising thereunder. However, the refusal of the State Supreme Court to grant review in the face of such a radical departure from settled principles of contract law that were specifically called to that court's attention in the Petition For Leave To Appeal did raise very serious and substantial federal questions. These were brought to that Court's attention at the earliest opportunity thereafter by way of the Motion For Reconsideration.

In the case of *Herndon* v. *State of Georgia,* 295 U.S. 441 (1935), 55 S. Ct. 794 at page 795, this Court, in deciding whether a federal question had been raised timely stated:

> "Petitioner, however, contends that the present case falls within an exception to the rule,—namely that the question respecting the validity of the state as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. (citations omitted)."

Prior to the decision in this case the law in Illinois had long been the principle announced in *Thomas Hoist Company* v. *William J. Newman Company,* 365 Ill. 160, 6 N.E. 2d 171, 174, where the Court had said:

> "It is the duty of a Court, when construing written contracts, to determine and give effect to the intention of the contracting parties. In arriving at this intention, effect must be given to each clause and word used, without rejecting any words as meaningless or as surplusage (*Mittel* v. *Karl,* 133 Ill. 65, 24 N.E. 553, 8 LRA 655; *Lehndorf* v. *Cope,* 122 Ill. 317, 13 N.E. 505; 6 RCL p. 837) but where there are two clauses in a contract which are so entirely repugnant to each other that they cannot stand together, the first shall be received and the latter rejected. *Benjamin* v. *McConnel,* 4 Gilm. 536, 46 Am. Dec. 474; 6 RCR., p. 748."

It is respectfully submitted that the contract here is an integrated instrument and when read as a whole, and not piece meal, presents no repugnancy among its several clauses.

In the instant case all of paragraph 9 having to do with quantity limitations, and the last clause in the first sentence of paragraph 11 stating, "as limited under paragraph 9 hereof" were dismissed by the Courts as of no significance whatsoever. Under the law in Illinois existing at the time the Petition For Leave To Appeal was filed such action did not amount to the construction and interpretation of a contract but rather the making of an entirely new contract for the parties under the quise of construction! This, no Court has power to do.

The Supreme Court of Illinois long ago in the case of *Consolidated Coal Company* v. *Peers, et al.,* 150 Ill. 344, 37 N.E. 937, which case was cited by the Appellate Court in support of its decision in the instant case, stated at p. 348,

> "It was said by Chief Justice Gibson in *Walker* v. *Physic,* 5 Barr (Pa.) 193, that the great rule for the interpretation of covenants is, to so expound them as to give effect to the actual intent of the parties, collected not from a single clause, but from the entire context. And in *Reniger* v. *Fogossa,* Plowd 18, it was said: "The scope and end of every matter is principally to be considered; and if the scope and end of the matter be satisfied, then is the matter itself, and the intent thereof, also satisfied? The doctrine of these cases has been frequently affirmed by this Court, and announced in decisions too numerous to specify."

Notwithstanding the quotation from the case cited above, the Appellate Court cited this case, but in its decision radically departed from the doctrine laid down in the case. The State Supreme Court countenanced this departure, and, in effect, affirmed it by refusing to review.

In *Agricultural Transp. Ass'n* v. *Carpenter,* 2 Ill. 2d 19, 116 N.E. 2d 863, the State Supreme Court there said at page 867:

> "Where the Supreme Court has declared the law on any point, it alone can overrule and modify its previous opinion, and the lower judicial tribunals are bound by such decisions and it is the duty of such lower tribunals to follow such decision in similar cases. *Rogers Park Water Company* v. *City of Chicago,* 131 Ill. App. 35; *Hannigan* v. *Chicago Motor Coach Company,* 348 Ill. App. 473, 109 N.E. 2d 381, *Quitman* v. *C.T.A.,* 348 Ill. App. 481, 109 N.E. 2d 373."

To support its decision reported in 81 Ill. App. 2d 22, 225 N.E. 2d 651, affirming the lower court decree rescinding the contract on the ground of impossibility of performance, the Appellate Court stated at p. 653:

> "As found by the master and chancellor, also without objection or exception by defendant, the estimated population and water needs of the two villages as contained in this 1953 report *formed the basis for the contract provision relating to maximum water requirements.*" (emphasis supplied)

The contract between the parties was entered into July 8, 1953. The engineering report referred to was addressed to the President and Board of Trustees of the Village of Robbins and received by them. It is dated August 20, 1953! No mention whatsoever is made of this report in the contract nor is it incorporated by reference or otherwise, nor could it have been since the contract antedates the report. Moreover, there was no testimony of any kind attempting to connect this report to the earlier dated contract. Under such circumstances how could it have formed the basis for anything in the contract? For the

Court to have ascribed to it the importance that it did in its opinion and to have used it for the purpose that it did was an arbitrary and capricious departure from settled principles of contract law. In *Telluride Power Transmission Company* v. *Crane,* 208 Ill. 218, 70 N.E. 319, the Supreme Court of Illinois stated at page 322:

> "The rule is that when the writings show, upon inspection a complete legal obligation, without any uncertainty or ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included in the writings."

The only "writings" in the instant case are those contained within the four corners of the contract of July 8, 1953.

It is interesting to observe that not being content with using one false premise to reach its conclusions, the Appellate Court used another in an entirely unprecedented manner. At page 655, supra, of its opinion the Court stated:

> "In seeking to improve Midlothian's water supply, its authorities were not merely attempting to meet their personal or political obligations to the residents of the village. Subject to a fine of $100.00 to $1,000.00 and/or imprisonment up to five years, custodians of public water supplies are required by statute to maintain a continuous supply of water, safe in quality and adequate in quantity. Ill. Rev. Stat. (1963) ch. 111½, Secs. 121 g and 121 n."

and at page 656 supra, of its opinion, the court stated:

> "We conclude that the contract was properly voided because of impossibility of performance. Williston on Contracts (rev. ed.) pp. 5410-5411; Restatement Contracts, Sec. 288; *Fisher* v. *United States Fidelity*

> *Guaranty Co.*, 313 Ill. App. 66, 39 N.E. 2d 67. That impossibility is accentuated by the parties statutory duty to furnish an adequate water supply to their respective villages. Ill. Rev. Stat. (1963), Ch. 111½, Sec. 121 g; 17 Am. Jur. 2d, "Contracts" Sec. 210; *Ideal Building Material Co.* v. *Benson Concrete Co.*, 273 Ill. App. 519, 525; *City of Vernon* v. *City of Los Angeles*, 45 Cal. 2d 710, 290 P. 2d 841."

While not expressly stating that the statute cited in the foregoing quotation formed the basis for completely ignoring Midlothian's admission that it had been purchasing water, at least, as early as 1962 from Blue Island and other adjacent villages, and had never severed its service main connection to Blue Island, it seems reasonable to infer that the Appellate Court did in fact use the statute referred to to exonerate Midlothian from any blame for its earlier breaches of the contract found by the Court to exist between the parties.

It is respectfully submitted that this is an unconstitutional application of this statute, as a reading of all of its provisions will disclose. If the law of this case as to that point is allowed to stand it will mean that hereafter Illinois municipalities, contracting with one another for a supply of water, can take cover under that statute, if they feel disposed to break their contract, even if it is one requiring the purchase of all of their requirements, as the Court, found this one to be. The present case is the first reported case ever to construe any part of that act in its sixteen (16) year history. What the Appellate Court did in this regard cannot fairly be regarded as merely an erroneous interpretation of a statute. There was no evidence in the record before it that Midlothian had ever been warned or charged under that act. Begin-

ning in 1962 it was Midlothian that had been charging Robbins with violations of that act!

In the case of *Williams* v. *Tooke, et al.,* 108 Fed. 2d 758 (CCA 5th) 1940 the Court there stated at page 759:

> "If all the judgments complained of were merely erroneous that would not amount to a denial of due process of law. *American Railway Express Company* v. *Kentucky,* 273 U.S. 269, 47 S. Ct. 353, 71 L. Ed. 639. However, if a case between private parties is arbitrarily and capriciously decided, in violation of settled principles of law and contrary to undisputed facts, though the Court so deciding had jurisdiction over the suit, the judgment may be in violation of the Fourteenth Amendment. *Postal Telegraph Cable Company* v. *Newport, Kentucky,* 247 U.S. 464, 38 S. Ct. 566, 62 L. Ed. 1215."

In reaching the conclusions that it did in this case, the Appellate Court not only cited inapplicable authorities for its construction and interpretation of the contract and for its finding that the doctrine of impossibility of performance was available to Midlothian as a remedy, but also arbitrarily decided at page 656:

> "Assuming that Robbins was bound to supply and Midlothian to purchase the actual needs of Midlothian, but not in excess of the limits prescribed in paragraph (9), that arrangement has been of no effect post 1963 since those limits expressly applied only during the first ten (10) years of the contract. The presently applicable language of paragraph (9), 'after which time a new annual average and maximum day requirement shall be determined * * *' has not been complied with (through no fault of Midlothian). But that fact does not release Midlothian from the 'exclusive' provision of paragraph (2) and its obligation thereunder to buy all its water from Robbins."

The decision of the Appellate Court, while not expressly stating the ground therefor, obviously proceeded on the rule of priority as between repugnant clauses. However, that is a rule that is only invoked when all else fails in an attempt to ascertain the intention of the parties as expressed in the whole of their agreement. This view of the duty of the courts in such cases had been the law and had been scrupulously adhered to by Illinois courts prior to the decision in this case. In the earlier case of *Samuels* v. *Meyerovitz,* 270 Ill. App. 210, where this question arose in the same First District of the Court that decided this case, the Court stated at page 214,

> "While the rule exists as these authorities show, it is resorted to by the courts with regret and usually in despair of finding a reasonable interpretation. As Professor Williston says, 'It is obvious, however, that such a rule is extremely artificial, and can only be accepted as a last resort' Williston On Contracts, Vol. 2, Sec. 624, p. 1208. In *Harper* v. *Hochstim,* 278 Fed. 102, 20 A. L. R. 1232, the opinion expressing the reluctance of the Court to resort to the application of this rule, said:
>
> > 'It cannot be doubted that it is only when parts of a written agreement are so radically repugnant that there is no rational interpretation that will render them effective and accordant that any part must perish.' *Rushing* v. *Manhattan,* etc., 224 Fed. 74, 139 C. C. A. 520."

At page 216 of *Samuels* v. *Meyerovitz,* supra, the court concluded by stating:

> "The two sections are not contradictory. They are complementary, and by this construction we are able to give effect to the whole instrument and harmonize it upon the theory that each article expresses an intention of the parties rather than upon the assump-

tion, which would seem improbable, that the parties inserted a whole section by which they meant nothing at all."

Midlothian first expressly stated its desires with reference to new maximum day requirements at the meeting of January 14, 1964 knowing full well that before Robbins could agree that the City of Chicago water department would have to investigate, prepare a new contract between Chicago and Robbins, submit it to the Chicago City Council and await its approval. On February 20, 1964, Midlothian filed its suit. In effect the Appellate Court said that because of this failure to immediately modify the provisions of paragraph (9) it automatically ended and a new contract came into being founded only, so far as quantity is concerned, on the provisions of paragraph (2). And this conclusion was reached in the face of evidence that since July 1963, Midlothian had continuously obtained an increasing supply of water from Robbins (and is doing so even to this day). There is no rule of law that this petitioner is aware of that permits a contracting party to breach,—not the contract originally engaged in by the parties, but even that contract tortuously found by the Court to exist, continue to accept the benefits thereof and then successfully have such a contract rescinded! No authority was cited by the Court in support of such a conclusion, and indeed, none exists prior to the decision in this case.

What the Illinois lower courts and officers have done in this case is to deliberately determine that this contract should be voided and then set about grasping for reasons to support that conclusion. To petitioner's dismay the State Supreme Court has not seen fit to right this judicial travesty. By refusing to review what has transpired below,

the State Supreme Court thereby tacitly condones, even if it does not entirely approve, (1) the use of the foregoing act in the manner in which it has been used, (2) the radical departure from long settled legal principles relating to the construction and interpretation of contracts, and (3) the use of the doctrine of impossibility of performance,—not to excuse performance by a defendant properly invoking it in the limited instances where it can be used as a defense in a suit on a contract,—but rather as a remedy by a plaintiff where the evidence demonstrates not just substantial performance but, more often than not, performance in excess of the stated quantity requirements set up in the contract!

The position taken by the Illinois lower courts on the questions raised by Midlothian's suit and the failure of the State Supreme Court to review amounts to a denial of due process of law and of the equal protection of the laws. The question that naturally arises under the circumstances is why has all of this occurred in this particular case. The answer becomes apparent when the respective populations of the two villages are examined. This Court is respectfully requested to take judicial notice of the statistical data contained in the 1960 Census with reference to the racial composition of Robbins and Midlothian. Robbins had then and has now a 95 percent or more Negro population; Midlothian had then and has now a 95 percent or more white population. These facts were known to the Master in Chancery, the Chancellor and the Appellate and Supreme Courts of this state without their being requested to take judicial notice of their existence. Petitioner, being a municipal corporation, has always been concerned about "law and order" in the streets everywhere long before it became a catch phrase.

As a result of its experience in this case it respectfully submits that there must also be "law and order" in Court decisions. The lack of same in the proceedings that this Court is being asked to review has acted to deprive petitioner of badly needed judicial aid that it had a right to look to its State Supreme Court for to protect its rights. This it has failed to receive.

Because of the foregoing, and because the decision of the Court below is contrary to long established legal principles of contract law, guarantees under the Fourteenth Amendment to the Constitution of the United States have been flagrantly denied and a writ of certiorari to review and reverse the decision below is required.

CONCLUSION.

For the foregoing reasons petitioner respectfully urges this Court to grant its Writ of Certiorari to review and reverse the decision of the Court below.

Respectfully submitted,

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APPENDIX A

Opinion of the Appellate Court of Illinois

Mr. Presiding Justice English Delivered the Opinion of the Court.

Defendant appeals from a decree approving a Master's report and entering a declaratory judgment in favor of plaintiff. A water supply contract between plaintiff and defendant was declared null and void because of impossibility of performance, and plaintiff was excused from further obligations thereunder.

Plaintiff moved to dismiss this appeal, and we took the motion with the case. That motion is now denied, as we shall decide the appeal on its merits.

The contract was entered into on July 8, 1953, and provided in pertinent part:

> (1) Robbins agrees to sell to Midlothian and Midlothian agrees to purchase from Robbins a supply of water subject to the provisions hereof.
>
> (2) Midlothian agrees to use Robbins' water exclusively during the period of this contract.
>
> (9) The supply of water to be furnished Midlothian by Robbins hereunder shall not exceed an annual average of 400,000 gallons per day and not to exceed 500,000 gallons in any one day, for a period of ten years (10), after which time a new annual average and maximum day requirement shall be determined.
>
> (10) This contract shall be in full force and continue in effect for a period of thirty (30) years from the date hereof.

(Appellate Court Opinion)

For the purpose of showing the estimated population and water consumption figures on which the parties based the terms of the contract in question, plaintiff introduced into evidence, without objection by defendant, the 1953 report of an engineering firm hired by defendant, which report revised and brought up to date a 1951 report by the same firm. As found by the Master and Chancellor, also without objection or exception by defendant, the estimated population and water needs of the two villages as contained in this 1953 report formed the basis for the contract provision relating to maximum water requirements. Among other things, the report projected population growth and water consumption for both villages during the thirty-year period to be covered by the water supply contract. Robbins was purchasing water from the City of Chicago for its own use and, under the contract, for resale to Midlothian. The contract provided that Robbins was to construct piping and pumping facilities sufficient to meet the needs of the two villages. Specifically, it called for construction of a 12″ line and pumping facilities considered adequate in the light of the following forecasts made by the report:

	Water Needs Per Day	
	1953	*1982*
Robbins	336,000	1,071,000
Midlothian	227,500	535,500
Totals	563,500	1,606,500

* * * * *

Maximum Water available through 12″ line

* * * * *

1,600,000 Gallons
per 24 hours

This is equal to Average 1982 day.

Year	Population (Robbins)	Population * * * (Midlothian)
1953	5,200	Construction Year
1954	6,000	3,490
* * *		
1962	11,060	5,410
* * *		
1964	11,580	5,890
* * *		
1983	15,920	7,730

It was apparent from this engineering advice that the maximum supply of water which Robbins was required to furnish Midlothian during the first ten years of the contract ("* * * an annual average of 400,000 gallons per day and not to exceed 500,000 gallons in any one day, * * *") would be well within the limits of water needs for that period, since it was based upon population figures projected for the thirtieth year of the contract. As found in the decree, however, the rapid growth of population and related water needs far exceeded engineering estimates and the expectations of both parties, and within ten years had gone beyond their contemplation at the time of the contract for the end of the thirty-year period.

The 1983 population of Midlothian was projected at 7,730, but a letter from the Bureau of the Census certified that in 1962 (according to a special census) "the population of the village of Midlothian, * * * was 8,749." Further, in the testimony of the Mayor of Midlothian, he estimated that as of 1964, the population had risen to 11,183. Water consumption had risen at an even greater rate, and in the first six months of 1964, Midlothian's daily average was

753,000 gallons, 162,000 gallons of which were acquired under emergency arrangements with the City of Blue Island. Again, this figure is far in excess of the projected Midlothian requirement of 535,500 gallons for 1982.

Returning to the date of the contract in 1953, when the 12″ pipe and pumping facilities were constructed, it seemed reasonable to expect they would be sufficient for the intended purposes. As noted, the capacity of the system was estimated to be about 1,600,000 gallons per 24 hours. That this was a sound approximation of capacity is borne out by the testimony of an engineer who made a study of both the 1953 report and the supply system as it existed in July 1963. He testified that his study "* * * shows that the water required for Robbins and Midlothian in May of 1963 was about 1,700,000 gallons on an average per day" and that the system's capacity "from an engineering * * * and * * * public health standpoint" would be only 1,400,000 gallons in a twenty four hour period. His opinion was that "* * * the facilities of the Village of Robbins to supply the Villages of Midlothian and Robbins are greatly inadequate." This opinion was shared by two other experts whose testimony was relied upon by the Master in his recommendations and adopted in the Chancellor's decree. It is important to note also in this regard the testimony of the Water Superintendent of Robbins. He said: "The amount of water supplied to Midlothian is the most we can supply them."

By the end of the first ten-year period of the contract there had thus been no substantial increase in the Robbins piping and pumping facilities. Nor had the parties determined a "new annual average and maximum day requirement" as called for by the contract.

On cross examination, the Mayor of Robbins admitted that at a conference held in January, 1964 the Mayor of Midlothian had requested additional supplies of water to the extent of one million gallons per day. This January conference was not the first attempt by Midlothian to alert Robbins to its increased needs. The Mayor of Midlothian testified that after his taking office in 1962, there had been about three meetings, telephone calls, and four or five letters, all in "an attempt in the last two years to get an increased water supply from Robbins." In the early summer of 1962, Midlothian officials, with the permission of the Mayor of Robbins:

> * * * put in a new pump, a 500 gallon per minute pump. We rewired the pump house. We hooked up their chlorinators and we rebuilt their other pump and reinstalled it. The purpose of doing all this was so we could get water. They weren't able to pump it that time, with no pumps. This work cost the Village of Midlothian around $5,000.00.

In that same year, Midlothian found it necessary to go to the Village of Markham for water on three different occasions. At other times during the existence of the contract with Robbins, Midlothian had been forced to obtain additional water from Posen and Blue Island, as well. These outside sources were on an emergency basis, however, and could not be relied on routinely. All during the time that Midlothian was pumping additional water from these other sources, the water was coming into the Midlothian reservoirs in a continuous supply from Robbins at maximum capacity rate. If the reservoirs had filled, the supply from Robbins would have been automatically shut off, but this hadn't occurred for at least two years prior

to 1964. On one occasion subsequent to the January 1964 meeting, the Mayor of Midlothian had to place an emergency call to the Mayor of Robbins for water because of a fire at a time when Midlothian had only 250,000 gallons of water at its disposal.

Further support for the conclusion that the Robbins water system was inadequate to supply both villages, was specified in the Master's findings as adopted verbatim by the Chancellor:

> 7) The water supply to Midlothian from Robbins became erratic when the population exceeded the estimated maximum population of that village and in 1962 no water was delivered to Midlothian on five days, in 1963 it was without water on nine days and for the first nine months of 1964 there was no water delivered for six days. On 400 days out of the two years, the amount of water delivered by Robbins to Midlothian was exceeded by the amount used by Midlothian.
>
> • • • • •
>
> 9) The Defendant, Village of Robbins, in order to protect its own water supply had on occasions prior to 1962 shut off the supply of water to Midlothian and Midlothian secured an injunction requiring Robbins to leave its valves open at all times. After the injunction was served upon Robbins, its officials left all valves open, which admitted water from Chicago and permitted Midlothian to acquire water from Robbins so that the amount of water delivered to Midlothian during the period subsequent to 1962 is the maximum amount available from the Robbins water supply. During the period Midlothian left all its valves open at all times and took all the water from Robbins which the Robbins system could supply it.
>
> • • • • •

11) These actions did not result in a sufficient supply and Midlothian purchased the additional amount needed for its inhabitants from all sources available to it, including an average purchase ranging from 125,000 gallons per day to 162,000 gallons per day in 1964 from the City of Blue Island during those months when that City had a supply in excess of its own needs and purchasing additional amounts from the Villages of Markham or Posen as supplies were available and emergencies required their purchase.

In seeking to improve Midlothian's water supply, its authorities were not merely attempting to meet their personal or political obligations to the residents of the village. Subject to a fine of $100 to $1000 and/or imprisonment up to five years, custodians of public water supplies are required by statute to maintain a continuous supply of water, safe in quality and adequate in quantity. Ill. Rev. Stat. (1963), ch. 111½, §§ 121.g. and 121.n.

Concern over potential compliance with this statute was expressed as early as 1962 by both the Illinois Department of Public Health and the Cook County Department of Public Health, as well as by the Water Distribution Division of the Bureau of Water of the City of Chicago. During the period from December 1961 to June 1964, at least six separate inspections were made by State health officials of the Robbins facilities and the results sent to Village officials emphasizing and re-emphasizing the progressive state of inadequacy into which the system had fallen. The public health officials repeatedly drew attention to the statute referred to above. One of these reports[1] noted

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[1] Letter to the Village President and Board of Trustees of Robbins, Illinois, from the Director, State of Illi-

that: "For quite sometime the Village of Midlothian has suffered periodical drought" and that the responsible conditions "may subject the public water supplies of Robbins and Midlothian to contamination." Particularly applicable here is the following sentence:

> The Midlothian public water supply is subject to further possible contamination due to the inability of Robbins to provide a regular satisfactory quantity of water.

Continuing with the language of the decree, the court further found:

> 16) The Defendant has known at all times since 1962 of its inability to perform because of the repeated requests of the Plaintiff for additional water supply, the acts of the Plaintiff in voluntarily improving the Robbins water system and the reports of the City of Chicago and the State Department of Public Health about its water supply. The Village of Midlothian has taken all steps reasonably required of a contracting party not only to attempt performance of its contract but also to assist the other contracting party so as to make performance by that party possible.

Defendant alleges that both the Master's report and the decree improperly interpreted the contract and are therefore erroneous as a matter of law; that the complaint and evidence in support thereof failed to show a justifiable controversy requiring a declaration of the rights of the parties; that if a breach of the contract has occurred,

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nois, Department of Public Health, dated May 24, 1963, reporting the results of an engineering survey made during the early months of 1963 pursuant to an agreement between officials of Robbins and Midlothian.

plaintiff has an adequate remedy at law for damages; and that the remedy of equitable rescission based on impossibility of performance was improperly invoked in this case.

We find the Master and Chancellor to have properly interpreted what we consider to be the key clause of the contract requiring Midlothian "to use Robbins' water exclusively during the period of this contract." Defendant argues unconvincingly that "exclusively" as used in this clause means "exclusively" up to the limits of "an annual average of 400,000 gallons per day and not to exceed 500,000 gallons in any one day," and that if Midlothian needed more water, they could go elsewhere to obtain it without breaching the contract. While we agree with defendant that paragraph (9), quoted above, is as much a part of the contract as paragraph (2), we cannot ignore the use of the word "exclusive." *Consolidated Coal Co.* v. *Joshua S. Peers, et al.*, 150 Ill. 344, 348; *American Medical Assn.* v. *Board of Review*, 392 Ill. 614, 622; Black's Law Dictionary, "Exclusive." *Illinois Central R. R. Co.* v. *Beebe*, 174 Ill. 13, 21; *Woods* v. *Great American Insurance Co.*, 265 Ill. App. 20, 23, and cases cited therein are not to the contrary. Assuming that Robbins was bound to supply and Midlothian to purchase the actual needs of Midlothian, but not in excess of the limits prescribed in paragraph (9), that arrangement has been of no effect post-1963 since those limits expressly applied only during the first ten years of the contract. The presently applicable language of paragraph (9), "after which time a new annual average and maximum day requirement shall be determined * * *" has not been complied with (through no fault of Midlothian). But the fact does not release Midlothian from the "exclusive" provision in paragraph (2) and its obligation thereunder

to buy all of its water from Robbins. Although the parties would be free to negotiate a new contract on terms now contended for by Robbins, and under which Midlothian would draw only part of its supply from the present system, that problem is not within the province of this court (*Pioneer Insurance Company* v. *Alliance Ins. Co.,* 374 Ill. 576, 590) and cannot be permitted to affect our decision. We conclude that the contract was properly voided because of impossibility of performance. Williston on Contracts (rev. ed.), pp. 5410-5411; Restatement, Contracts, § 288; *Fisher* v. *U.S. Fidelity Guaranty Co.,* 313 Ill. App. 66. That impossibility is accentuated by the parties' statutory duty to furnish an adequate water supply to their respective villages. (Ill. Rev. Stat. (1963), ch. 111½, § 121.g.; 17 Am. Jur. 2d, "Contracts," §210; *Ideal Building Material Co.* v. *Benson Concrete Co.,* 273 Ill. App. 519, 525; *City of Vernon* v. *City of Los Angeles,* 290 P. 2d 841.

We do not agree with defendant's second contention that the complaint and proofs in support thereof fail to show a justiciable controversy. Although the factual situation in *A.S. & W. Club* v. *Drobnick,* 26 Ill. 2d 521, 524, is distinguishable from this record, we find the reasoning of the court in *Drobnick* to be applicable here:

> It is clear from these allegations that the parties have taken an adverse position with respect to the meaning of the deed and plaintiff's duties thereunder. The dispute does not relate to a hypothetical case but is clearly an actual controversy calling for adjudication of present rights.

There is certainly a controversy between the parties to this cause as to whether for another sixteen years the Village of Midlothian is to remain tied exclusively to the in-

sufficient water supply currently being furnished by the Village of Robbins, or whether it may seek an adequate supply elsewhere. We fail to see how, in this situation, Midlothian could be given appropriate relief by recourse to damages at law, particularly when we bear in mind the statutory penalties for failure to meet its obligations to its citizens.

Defendant's last contention that plaintiff has improvidently utilized equitable rescission is likewise unavailing. The situation presented by this action is not one of "subjective impossibility" as argued by defendant from *Gulf, M. & O. R. Co.* v. *Illinois C. R. Co.*, 128 F. Supp. 311, aff'd. 225 F. 2d 816 (5th Cir., 1955), cert. denied 350 U.S. 932-933; 84 A.L.R. 2d 12, 29-30; and Restatement, Contracts, § 455. The case before us presents, rather, an objective impossibility. The water system as constructed and maintained without substantial expansion, represented the contemplation of the parties as they viewed the future at the time of the contract. As must have happened many times in our burgeoning suburbs, it was built upon estimates and projections made in 1953 which have subsequently been shown to be seriously deficient. The evidence clearly establishes that the contract cannot be performed, and the remedy granted was proper.

Nor does this conclusion run counter to general principles of equity. In buying water from Chicago and reselling it to Midlothian, Robbins is not exercising its own governmental function, but is simply engaged in a venture for the making of money. As in the case of any responsible businessman, it is therefore not unreasonable that it be required to produce in quality and quantity sufficient to satisfy the contract needs of its customer. This it has

failed to do, despite more than ample warnings of its progressive inability to meet even its current obligations.

The judgment of the Circuit Court is affirmed.

Affirmed.

DRUCKER and MCCORMICK, JJ., concur.

APPENDIX B

Constitutional Provisions Involved.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Constitution of Illinois 1807:

ARTICLE II

Section 2. No person shall be deprived of life, liberty or property, without due process of law.

APPENDIX C

Illinois Revised Statutes, 1965, Chapter 111½, Sections 121a to 121o, inclusive.

PUBLIC WATER SUPPLIES

AN ACT to provide for safeguarding the public health by vesting certain measures of control and supervision in the Department of Public Health over public water supplies in the State. Approved Aug. 6, 1951. L.1951, p. 2091.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

121a. *Definitions.*] § 1. For the purposes of this Act:[1]

"Public water supply" means all mains, pipes and structures through which water is obtained and distributed to the public, including wells and well structures, intakes and cribs, pumping stations, treatment plants, reservoirs, storage tanks and appurtenances, collectively or severally, actually used or intended for use for the purpose of furnishing water for drinking or general domestic use in incorporated municipalities; or unincorporated communities where 10 or more separate lots or properties are being served or intended to be served; State-owned parks and memorials; and State-owned educational, charitable, or penal institutions.

"Department" means the Department of Public Health.

"Director" means the Director of the Department of Public Health.

"Owners or Official Custodians" means any individual, public or private corporation, political subdivision, government agency, municipality, public or private institution, industry, co-partnership, association, firm, trust, es-

tate or any other entity whatsoever. As amended by act approved Aug. 19, 1963. L.1963, p. 3201.

[1] Sections 121a et seq. of this chapter.

121b. *Submission of plans and specifications—Injunction.*] § 2. Owners of public water supplies, their authorized representatives, or legal custodians shall submit plans and specifications to the Department and obtain written approval before construction of any proposed public water supply installations, changes, or additions is started. Plans and specifications shall be complete and of sufficient detail to show all proposed construction, changes, or additions that may affect sanitary quality, mineral quality, or adequacy of the public supply; and, where necessary, said plans and specifications shall be accompanied by supplemental data as may be required by the Department to permit a complete review thereof. Plans and specifications shall be prepared only by such persons as may be permitted by law.

It shall be the duty of the Attorney General upon the request of the Director to bring an action for injunction against any person constructing any public water supply installations, changes, or additions without first having obtained approval from the Department, as heretofore required by this Section. As amended by act approved Aug. 19, 1963. L.1963, p. 3201.

121c. *Deviation from approved plans and specifications.*] 3 §. There shall be no deviation from the plans and specifications as approved by the Department for public water supply installations, changes, or additions, unless and until revised plans and specifications are submitted to the Department and written supplemental approval has been issued therefor.

121d. *Review and approval of plans.*] § 4. Plans and specifications for public water supply installations, changes, or additions submitted to the Department for review and approval as authorized under Sections 2 and

3 of this Act,[1] shall be reviewed by the Department and written approval issued to owners or legal custodians, of plans and specifications deemed by the Department to be satisfactory from the standpoint of sanitary quality, mineral quality, and adequacy of the water supply.

[1] Sections 121b, 121c of this chapter.

121e. *Procedure for review of plans.*] § 5. The Department shall have the right to establish procedure for the review of plans and specifications and the method and manner under which plans, specifications, and other data relative to public water supply installations, changes, or additions shall be submitted.

121f. *Rules and regulations.*] § 6. The Department shall have the right to adopt and enforce rules and regulations governing the location, design, construction, and continuous operation and maintenance of public water supply installations, changes, or additions which may affect the continuous sanitary quality, mineral quality, or adequacy of the public water supply. As amended by act approved Aug. 19, 1963. L.1963, p. 3201.

121g. *Operation and maintenance of facilities.*] § 7. Owners and official custodians of public water supplies shall direct and maintain the continuous operation and maintenance of water-supply facilities so that water shall be assuredly safe in quality, clean, adequate in quantity, and of satisfactory mineral character for ordinary domestic consumption. As amended by act approved July 10, 1957. L.1957, p. 2424.

121h. *Samples of water for analyses.*] § 8. Owners or official custodians of public water supplies shall submit or cause to be submitted by operating personnel, such samples of water for analyses as may be requested by the Department, which samples shall be collected in such manner and at such points as the Department may direct, and thereupon sent to the Department laboratories.

(Statutes Involved)

121i. *Reports of operation—Inspection and investigation.*] § 9. Owners and official custodians of public water supplies shall submit or cause to be submitted by operating personnel such reports of operation pertaining to the sanitary quality, mineral quality, or adequacy as may be requested by the Department. Such operation reports shall be submitted within 15 days after demand therefor by the Department and shall be accurate and as complete as requested by the Department.

Any representative of the Department shall have the right to enter at all reasonable times in or upon the property of any public water supply for the purpose of inspecting and investigating the adequacy, sanitary, and mineral quality of its water. As amended by act approved Aug. 19, 1963. L.1963, p. 3201.

121j. *Correction of sanitary defects.*] § 10. When the water from a public water supply is not safe or is subject to contamination, as determined by inspection and report of the Department, the owners or official custodians of such public water supplies shall take immediate action to correct sanitary defects, improve operation, provide necessary water treatment, or make any other changes or additions necessary to provide assuredly safe water.

121k. *Investigations—Hearing.*] § 11. Whenever investigations indicate that the water from a public water supply is not safe or is subject to contamination and in the opinion of the Director of the Department the health of the water consumers is or may become endangered, the Director may call owners or official custodians of such public water supplies to a hearing at a time and place in the State designated by him. The notice of such hearing shall be served in person or by registered mail upon such water-supply owners or official custodians, giving the time, place, and reason for such hearing; and in case of a municipality or a corporation such service shall be upon

an officer thereof. At any such hearing the owners or official custodians shall be given an opportunity to show cause why sanitary defects should not be corrected or operation of the water supply improved in order to make the water assuredly safe; and, if in the opinion of the Director such cause is not shown, the Director shall order in writing any such corrections, changes, or additions to be made as may be necessary to provide assuredly safe water, directing that within a specified time thereafter, corrections, changes, or additions shall be provided.

121k1. *Procedure—Attendance of witnesses—Rules of evidence.*] § 11.1. The hearing shall be conducted by the Director, or a duly qualified employee of the Department designated in writing by the Director as a Hearing Officer to conduct the hearing.

The Director or Hearing Officer may compel by subpoena or subpoena duces tecum the attendance and testimony of witnesses and the production of books and papers, and administer oaths to witnesses. The hearing shall be conducted at such place as designated by the Department.

In the event of the inability of any party or the Department to procure the attendance of witnesses to give testimony or to produce books and papers, such party or the Department may take the deposition of witnesses in accordance with the provisions of the laws of this State. All testimony taken at a hearing shall be reduced to writing. All such testimony and other evidence introduced at the hearing shall be a part of the record of the hearing.

The Director shall make findings of fact in such hearing and shall render his decision within 30 days after the termination of the hearing unless additional time is required by him for a proper disposition of the matter. When the hearing has been conducted by a Hearing Officer, the Director shall review the record before rendering a decision.

(Statutes Involved)

Technical errors in the proceedings before the Director or Hearing Officer or the failure of the Director or Hearing Officer to observe the technical rules of evidence shall not constitute grounds for the reversal of any administrative decision unless it appears to the court that such error or failure materially affects the rights of any party and results in substantial injustice to him.

All subpoenas issued by the Director or Hearing Officer may be served as provided for in civil actions. The fees of witnesses for attendance and travel shall be the same as the fees for witnesses before the Circuit Court and shall be paid by the party to such proceeding at whose request the subpoena is issued. If such subpoena is issued at the request of the Department, the witness fee shall be paid as an administrative expense.

The Department shall not be required to certify any record or file any answer or otherwise appear in any proceeding for judicial review unless the party filing the complaint deposits with the clerk of the court the sum of 95 cents per page representing costs of such certification. Failure on the part of the plaintiff to make such deposit shall be grounds for dismissal of the action.

In cases of a refusal of a witness to attend or testify or to produce books or papers concerning any matter upon which he might be lawfully examined, the Circuit Court of the county wherein the hearing is held, or the judge thereof, upon application of any party to the proceeding, may compel obedience by proceeding as for contempt of court as in cases of a like refusal to obey a similar order of such court.

The Department may adopt such rules and regulations that it may deem necessary from time to time to carry out the provisions of this Section to facilitate the procedure of such hearings. As amended by act approved Aug. 19, 1963. L.1963, p. 3201.

Section added: L.1957, p. 2424.

(Statutes Involved)

121l. *Mandamus to force compliance with orders.*] § 12. If the maintenance or operation of any public water supply is continued contrary to orders of the Director of the Department issued as authorized in Section 11 of this Act,[1] it shall be the duty of the Attorney General to institute mandamus proceedings in the name of the People of the State of Illinois to force compliance with such orders.

[1] Section 121k of this chapter.

121m. *Liability for damage.*] § 13. Compliance with requirements of this Act[1] shall in no way release the owners or official custodians of a public water supply from any liability for damage to person or property caused by or resulting from the installation, operation, or maintenance of a public water supply.

[1] Sections 121a-121m of this chapter.

121n. *Penalty.*] § 14. Any public water supply owner; owner's manager or agent; official custodian; municipal, State, or other official violating or aiding and abetting the violation of any provisions of this Act[1] or refusing or neglecting to comply with any order issued by the Director as hereinbefore provided shall, upon conviction, be fined not less than $100 nor more than $1,000 or imprisoned for a period not to exceed 5 years, or both. As amended by act approved July 10, 1957. L.1957, p. 2424.

[1] Sections 121a-121n of this chapter.

121o. *Severability clause.*] § 15. If any section, clause, sentence or paragraph in this Act shall be held to be unconstitutional, the unconstitutionality thereof shall not affect the remaining parts of this Act. Added by act approved Aug. 19, 1963. L.1963, p. 3201.

(Statutes Involved)

42 U.S.C., § 1981. *Equal rights under the law.*

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other. R.S. § 1977.

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No. 952

In the

Supreme Court of the United States

OCTOBER TERM, 1967.

VILLAGE OF MIDLOTHIAN,
A Municipal Corporation,

Plaintiff-Respondent,

vs.

VILLAGE OF ROBBINS,
A Municipal Corporation,

Defendant-Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT AND THE SUPREME COURT OF ILLINOIS

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The Scheffer Press, Inc.—ANdover 3-6850

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The Petitioner has not been denied due process or equal protection of the laws.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT AND THE SUPREME COURT OF ILLINOIS

OPINION BELOW

The statement by Petitioner that no formal opinion was entered by the Circuit Court, Chancery Division of Cook County is erroneous. The Chancellor entered a formal decree in this case making findings of fact and conclusions of law, which is to be found at Pages 101 through 107 of the record herein and was abstracted by the Petitioner here in his Abstract to the Appellate Court of Illinois (Case 50849 at Pages 35 through 42).

RESTATEMENT OF THE QUESTION PRESENTED

Where the Supreme Court of Illinois refuses to review a decision of the Appellate Court of that State affirming a decree of the Circuit Court of Cook County, which sustained a Master's Report making findings as to fact and law, that a contract for water between two municipal corporations was impossible of performance and required recission in order for the contracting parties to be enabled to furnish a safe adequate supply of water for their citizens, and on Motion for Reconsideration of that decision again denies the review, has the unsuccessful litigant been deprived of "due process of law" or "equal protection of the law" merely because it contends that there has been an erroneous interpretation of Illinois law as applied to the contract?

ADDITIONS AND CORRECTIONS IN THE STATEMENT OF FACTS

The following are excerpts from the contract between the parties which was involved in this litigation, which we believe are material to the decision and which were omitted by Petitioner (Petition Pages 4 and 5).

Page of Record

7 WITNESSETH:

Whereas, Midlothian and Robbins are Municipal Corporations located within the Sanitary District of Chicago and are desirous of securing a supply of water for the needs of their respective inhabitants; and

Whereas, the water supply now used by said Midlothian and Robbins is purchased from the City of Blue Island, Cook County, Illinois, and Robbins is desirous of obtaining a supply of water from Chicago, and Midlothian is desirous of obtaining a supply of water from Robbins, and

Whereas, the City of Chicago and the Village of Robbins have entered into an agreement bearing the date of the 7th day of July, 1953, for the furnishing by the City of Chicago to Robbins of a supply of water from Chicago's water main at 119th Street and Rockwell Street for a period of Ten Years, and the water main of Robbins to the aforementioned connecting point is of sufficient size to afford Robbins and ample reserve above its present needs and Midlothian does not have a water main between its territory and the Chicago City limits through which to draw a supply of water; and

Whereas, Robbins has secured the consent in writing of the City Council of the City of Chicago, Cook County, Illinois, to sell water to Midlothian, and

Whereas, Robbins is willing to sell to Midlothian and Midlothian is willing to purchase a supply of water from Robbins;

Now Therefore, in consideration of the mutual covenants and agreements hereinafter set forth, Midlothian and Robbins agree with each as follows: . . . ."

• • •

"12. Robbins shall maintain and keep in efficient operation its water main from the City of Chicago connection to the point where Midlothian shall connect its mains to Robbins."

• • •

The following findings and conclusions of the Master, who was present at the examination of witnesses and was the trior of the facts, have been omitted,

(Petition Pages 5 through 7):

57 5) Prior to the entry into the contract the Defendant village procured an engineering report from Walter Wilson in which the population of each of the contracting villages was estimated for each of the years 1953 through 1983 and based on those population estimates the water needs of each of the villages was estimated for each of those years. These

estimates projected the population of Midlothian to a maximum of 7,730 in 1983 and projected the water needs of that village at a maximum daily average of 535,000 gallons by 1983. The report of the engineer recommended the installation of a twelve inch line connecting the Robbins water supply directly with the City of Chicago water supply, which line it was estimated would supply a maximum of 1,600,000 gallons per day. This was the estimated maximum which was projected as the combined needs of both villages by 1983."

9) The Defendant, Village of Robbins, in order to protect its own water supply had on occasions prior to 1962 shut off the supply of water to Midlothian and Midlothian secured an injunction requiring Robbins to leave its valves open at all times. After the injunction was served upon Robbins, its officials left all valves open, which admitted water from Chicago and permitted Midlothian to acquire water from Rob-
59 bins so that the amount of water delivered to Midlothian during the period subsequent to 1962 is the maximum amount available from the Robbins water supply. During the period Midlothian left all its valves open at all times and took all the water from Robbins which the Robbins system could supply it.

10) Midlothian, Plaintiff village, attempted to assist Defendant village in correcting the inadequacies of the Defendant's system by the expenditure of Five Thousand ($5,000.00) Dollars on Defendant's system in installing a new 500 gallon per minute pump, rewiring Defendant's pump house, hooking up its chlorinator and rebuilding and reinstalling a second pump in the Robbins system.

12) Engineering reports prepared by Consoer Townsend & Associates disclose that the safe amount of water to be drawn by Robbins from the City of Chicago supply main would be 1,380,000 gallons per day. This report was examined by two qualified independent engineers hired for that purpose who

stated that in their opinion the computations used in arriving at this conclusion were accurate and the
60 conclusion sound. This testimony is buttressed by the estimate of Mr. Walter Wilson, who reported at the time of design that the system was capable of delivering 1,600,000 gallons per day and is further buttressed by the usage of water by the two villages which show that they are taking a combined total of 1,600,000 gallons per day. The only evidence to the contrary was one witness for the Defendant who estimated that under certain conditions the Robbins supply could be increased to a maximum of 1,900,000 gallons per day. The conditions under which this is possible were not shown to have existed to the knowledge of this witness and his conclusions were at variance with the manifest weight of the other engineering testimony and the factual situation disclosed by all the evidence.

13) An actual controversy exists between the Plaintiff and the Defendant as to the construction of the contract between them and a determination of their rights and obligations thereunder. The contract between the parties specifically provides that Midlothian is to use Robbins water exclusively during the period of the contract and although not explicitly stated, it is implicit in the contract that Robbins is therefore required to supply all of the water Midlothian needs."

The comments by Petitioner as to supplying Midlothian with water in amounts exceeding the maximum called for by Paragraph 9 of the Contract (Petition Page 7) ignore the fact shown by the contract and found by the Master and the Appellate Court that there were no maximums in the contract after July 8, 1963.

The statements of the Petitioner (Petition Page 8) as to the course of proceedings through the Illinois Courts are very incomplete. For example, the Appellate Court

of Illinois on July 7, 1966, on Motion of the Respondent, Village of Midlothian, first dismissed Robbins appeal which dismissal Order was prematurely reported at 218 N.E. 2nd 496. Thereafter a Petition for Rehearing of that action was filed by Robbins on July 22, 1966; an Amended Petition for Rehearing was filed on July 27, 1966 and an Amendment to the Amended Petition for Rehearing was filed on August 17, 1966. As a result of these documents, the Order dismissing the appeal was vacated until a hearing on the merits of the case could be had. Thereafter an oral argument was had and after consideration on the merits, a unanimous court affirmed the lower court decree. (Appendix B this brief)

Under Illinois procedure only if a constitutional question then exists (Illinois Revised Statutes, 1967, Chapter 110A, Section 317) review by the Illinois Supreme Court may be had as of right, otherwise review must be sought by means of a Petition for Leave to Appeal, (Chapter 110A, Section 315) which will be granted as a matter of sound judicial discretion. (Appendix A this brief) The Petition filed by Robbins contained the language cited in Page 8 of the Petition, but we submit it is not language raising a constitutional question and Petitioner recognized that it did not since the manner of review was not the mode to be used if a constitutional question were presented.

After consideration of this Petition, the Supreme Court of Illinois denied Leave to Appeal. There is no provision in Illinois practice for Petition for Rehearing on this exercise of discretion in denial of Leave to Appeal, but none the less a document entitled Petition for Rehearing was filed by Robbins, and treated by the Court as a Motion for Reconsideration. It was subsequently passed on and denied.

Completely omitted from Petitioner's statement of facts is any reference to Plaintiff's Exhibit #2 which was admitted into evidence, without objection by Robbins, and which reads in part as follows:

August 20, 1953

Honorable President and Board of Trustees
Village of Robbins
Robbins, Illinois

Gentlemen:

On October 1, 1951 I submitted to your Honorable Body a report covering the study of the sanitary sewer and water conditions of your Village. This report embodied an estimate of cost of construction of $945,000.00.

Since that time, your Village has awarded contracts for the construction of the proposed work and have passed an ordinance authorizing and providing for the issuance of $1,135,000.00 Water and Sewer Revenue Bonds for the purpose of defraying the cost of improving and extending the present water works and sewerage systems of your Village.

It becomes necessary at this time that my report of October 1, 1951 be revised and brought up to date. Following is a revised report covering this proposed project.

* * * *

With reference to the Village of Midlothian, I have analyzed its growth as follows, and have discussed same with Mr. Robinson, its Engineer, and we agree with reference to this picture. The population of Midlothian in 1953 is established at 3,250. We have computed a growth table which makes the population of Midlothian 7,730 in 1983.

The Village of Robbins has no storage capacity at this time. It is the intent of the water project to construct a 12" water main starting at 119th Street and

Rockwell Avenue, the City of Chicago limits, at which point this line will connect to a City of Chicago 12" water main. This 12" line will then be laid as follows: in 119th Street West to Kedzie Avenue, thence South on Kedzie Avenue to 135th Street in the Village of Robbins at which point a pumping station and a 250,000 gallon elevated storage tank will be erected. This pumping station will have in it, one 500 gallon per minute pump and one 250 gallon per minute pump.

The design of this 12" line to this point shows the following:

Design of Water Line From Chicago

Elevation Ground at Chicago	63.00
Elevation Ground at Pumping Station	17.00
Difference in Ground Elevations	46.00 feet
Length of line, Chicago to 135th Street and Kedzie Avenue	14,500 feet

Water Needs Per Day

	1953	1982
Robbins	336,000	1,071,000
Midlothian	227,500	535,500
Totals	563,500	1,606,500
Pressure at City of Chicago	25 lbs.	57.95 feet
Drop in Land		46.00 feet
Feet of Head Available		103.95

1952 usage 563,500 galons per day

Maximum day equals 845,000 gallons per day using 16 hours as drawing time this is 1,250,000 gallons per day

Friction loss based on C-140 equals 1.71 feet per 1,000=24.88 feet

Loss in Meter Vault 3 lbs.—6.93

Total Loss 31.81 feet

Balance 72.14 feet

equals pressure available at 135th Street and Kedzie Avenue 31 lbs.

• • •

Maximum Water available through 12" line assuming 25 lbs. pressure at 135th Street and Kedzie Avenue

Feet available for friction loss	46.00	
Loss in Meter Vault	7.00	39.00
Equals per 1,000 feet of pipe	2.68	feet
Equals delivery at 135th Street and Kedzie Avenue	1,600,000 Gallons per 24 hours	

This is equal to Average 1982 day. At which time Robbins will have 1,250,000 gallons storage and Midlothian will have

505,000 gallons storage

1,755,000 gallons storage total.

This is in excess of one day's supply which means that the 12" line will deliver at 135th Street and Kedzie Avenue sufficient water at 25 lbs. pressure to keep the reservoirs full providing the draw from Chicago is made over a 24-hour period, which is the normal method of operation from Chicago.

REASONS FOR DENYING CERTIORARI

A. THE DECISION OF THE ILLINOIS APPELLATE COURT HEREIN, WHICH THE SUPREME COURT OF ILLINOIS REFUSED TO DISTURB, IS A CORRECT INTERPRETATION OF ILLINOIS LAW AND THE DECISION SHOULD HAVE BEEN ANTICIPATED BY THE UNSUCCESSFUL LITIGANT.

The Petitioner in this case seeks review under the pretext of having been denied due process or equal protection of the law by asserting that the decision is contrary to the previous law of this state. Examination of all the authorities cited by him and of the authorities cited in the Opinion, disclose that the Appellate Court of Illinois has construed the contract between the parties in a manner which gives effect to each clause and word used, and which interprets the contract in the light of the intentions of the parties at the time they entered into the contract. The rule of law announced in the cases of *Thomas Hoist Company* v. *William J. Newman Company,* 365 Ill. 160; *Consolidated Coal Co.* v. *Peers,* 150 Ill. 344, and *Telluride Power Transmission Company* v. *Crane,* 208 Ill. 218, relied on by petitioner which is therefore acknowledged as the law of Illinois was followed by the Court in this decision.

Petitioner, however, chooses to ignore those facts which indicate the intention of the parties to this contract and by restricting itself to its interpretation of the facts contends that the courts conclusion is at variance with the prior Illinois law.

The facts existing at the time this contract was entered into are disclosed partially in the introductory paragraphs of the contract to the effect that both parties needed and were willing to purchase a supply of water from the City of Chicago through a water main to be erected by Robbins and maintained by them in return for which

Midlothian agreed to purchase all of the water it needed from Robbins. It was stated by the parties in the contract itself that the water main of Robbins was of sufficient size to afford an ample reserve above its present needs, which main Robbins would keep and maintain in efficient operation.

The size of the main was determined after an engineering study made by Robbins' engineer, which was commenced in 1951 and which estimated the needs of both villages for a period of 30 years from the amended report of 1953. The report estimated the needs of the two villages at 1,600,000 gallons per day in 1983 based on their projected population and designed a main capable of transmitting 1,600,000 gallons per day. From that report it would appear that the main was adequate to service both communities for the proposed 30 year period of the contract. With this report in mind, there was included in the contract a provision that Midlothian would use Robbins water exclusively.

The parties, however, for the first ten year period restricted the maximum amount of water which could be taken by Midlothian to an amount estimated within the anticipated needs of that village for the first ten years and provided for a new maximum amount to be determined after the first ten year period.

The interpretation by the Appellate Court of Illinois took into consideration the parties intentions as disclosed by these clauses which are not repugnant or conflicting, but when read in the light of the whole instrument, disclose the intention of Robbins to be the sole supplier of Midlothian's water and Midlothian's intention to have an adequate supply of water available through the Robbins pipes.

A fact not in contemplation of the parties at the time of entering this contract was the enormous increase in population in the suburban areas around Chicago in the period following the execution of this contract. In 1962 Midlothian authorities, still relying on and intending to get all of their water from Robbins, first secured an injunction against the Robbins authorities preventing them from shutting off valves so that there was a free flow of all water available through the pipe, then assisted in upgrading the Robbins pumping facilities, again with the intention of securing more water from the village to which they were bound to purchase water and only after these steps proved unsuccessful in procuring an adequate supply was examination made of the Robbins transmission main from Chicago and the discovery made that the main would never be large enough to provide an adequate flow of water to provide both villages. It was then, according to the evidence in the case, that the village authorities of Midlothian, by letter, telephone call and finally by face to face meeting, advised Robbins that the parties would be unable to comply with the exclusive provisions of the contract as required in Paragraph 2 of said contract or obtain a new maximum day requirement equal to its needs as required by Paragraph 9 of the contract, since the transmission pipe was then delivering at its peak capacity, and its peak capacity was woefully insufficient. (Record pp. 59-60)

This was the situation which led the Court to interpret the contract considering all its clauses to require Midlothian to use Robbins water exclusively and to excuse Midlothian from the contract since Robbins was unable to supply the needs of Midlothian.

Had the Petitioner in this case been willing to recognize the fact that Paragraph 9 of the contract was limited to

a ten year period; that Midlothian had done everything in good faith necessary to take all of the water available from Robbins exclusively and still protect its water users, and that the report of the engineer hired by it on the basis of which it had awarded contracts for construction of the water main and passed ordinances providing for the payment for same, had shown in unmistakeable terms and figures that the maximum capacity of the main would deprive the villages using the same of an adequate water supply under conditions then existing and applied those facts to the Illinois law, it would have anticipated the ruling of the Illinois courts and freed Midlothian from the exclusive provisions of the contract permitting it to make plans for an adequate water supply.

The complete legal obligation of Robbins to supply all of Midlothian's water needs is found in the four corners of the contract document and the interpretation placed on the contract by the parties themselves disclose their intention. Since the facts existing in 1964, however, disclose that the intention of the parties cannot be carried out, the Court excused performance under Applicable law and this result should have been anticipated by the unsuccessful litigant herein.

The subject matter of this litigation is local to Illinois; the parties are both creatures of the Illinois legislature; the rights of the parties and their duties depend wholly upon the construction to be given the laws of Illinois. In a case coming to the United States Supreme Court on appeal from the Illinois Supreme Courts, the Supreme Court should accept the decision of the State Court on interpretation of state law, *Georgia Ry. Co.* v. *Decatur*, 262 U.S. 432, 43 Supreme Court, 613; *Erie RR* v. *Tompkins*, 58 Sup. Ct. 817; *City of Albertville, Ala.* v. *U. S. F. and G. Co.*, 272 Fed. 2nd 594.

In considering whether it should grant certiorari in this case, the Court should be mindful of its own words in the

case of *Tampa Waterworks* v. *Tampa,* 199 U.S. 539, 26 Supreme Court, 15, at 24:

> "The single question is whether the City of Tampa is bound for 30 years from the date of its agreement (to be permitted certain rates to be charged) even if they have ceased to be reasonable. We are not prepared to say that the Supreme Court of Florida was wrong in deciding that it is not bound."

Likewise here, the Courts of Illinois having decided that the construction of the contract between the parties is such that the contract is impossible of performance and should not deprive Midlothian of water needed for growth for the next 20 years, this Court should deny certiorari and allow the interpretation of state law by the state court to govern the rights of the parties.

Again setting up a straw man for the purpose of knocking him down, the Petitioner argues that the Court proceeded on the rule of priority as between repugnant clauses. Although this could have been the basis for the decision, since the second clause requiring Midlothian to use Robbins water exclusively preceded the ninth clause which provided a maximum for a 10 year period, the Court as the opinion shows (Petition 9A) based its opinion on the fact that Paragraph 9 was no longer operative having expired a year before this case was commenced and that their decision was made so that some meaning could be given to the use of the word "exclusive." Therefore, the contention of the Petitioner that the decision should not have been on the basis of invoking priority as between repugnant clauses is meaningless in a case where that method of interpretation was not used by the court.

The Petitioner also chooses to ignore the uncontradicted testimony (Opinion Petition 5A) to the effect that the mayor of Midlothian had held about three meetings, had made telephone calls and sent four or five letters in an attempt, between 1962 and 1964, to get an increased water supply from Robbins.

The Petitioner attempts to convey the impression that Midlothian acted precipitously by filing this action as soon as the ten year period, mentioned in Paragraph 9, had expired. Petitioner's argument here, as his entire argument on the interpretation of this contract, is an attempt to re-write history and change the facts which existed at the time of entering into this contract and at the time when it became impossible of performance.

B. THE CONSTRUCTION OF THE ILLINOIS STATUTE REQUIRING ADEQUATE, SAFE WATER SUPPLY BY MUNICIPALITIES AND OTHER SUPPLIERS DOES NOT CONSTITUTE AN UNCONSTITUTIONAL INTERPRETATION OF THAT STATUTE.

Petitioner seeks to convince the court that the Illinois courts have made an unconstitutional interpretation of the statute affecting public water supplies (Appendix C, page 13A and following of the Petition) and particularly with Section 121G thereof (Petition 15A) by inferring that despite the existence of a contract to use Robbins water exclusively, Midlothian was required to first comply with the statute and when the volume of water coming from Robbins did not permit such compliance, to seek other sources and to seek a declaratory judgment that it was not bound to use Robbins water exclusively.

Both of the parties hereto are creatures of the Illinois legislature. That legislature could dissolve either or both of these municipal corporations; that legislature could

also impose upon either or both duties to provide safe and adequate supplies of water for their inhabitants.

The Fourteenth Amendment cannot be invoked by a municipal corporation against the legislature which created it, *Worcester* v. *Worcester Consolidated Street R. Co.*, 196 U. S. 539, 25 Supreme Court, 327; *Risty* v. *Chicago R. I. & P. Ry. Co.*, 270 U.S. 378, 46 Supreme Court 237.

As stated in this latter case, (Page 241,)

> "The power of the state and its agencies over municipal corporations within its territory is not restrained by the provisions of the Fourteenth Amendment" (citing cases).

C. EVEN IF THIS HAD BEEN A MERITORIOUS CLAIM OF VIOLATION OF CONSTITUTIONAL RIGHTS SINCE IT IS RAISED FOR THE FIRST TIME AFTER A FINAL DECISION IN ILLINOIS COURTS OF REVIEW IT SHOULD NOT BE CONSIDERED.

The Petitioner seeks to establish jurisdiction for certiorari in this case despite the lack of a timely raising of the question of "due process and equal protection" on the authority of *Herndon* v. *State of Georgia,* 295 U.S. 441, 55 Supreme Court, 794 (Petition Page 11). An examination of the quotation contained therein discloses that the court was there considering a contention of an unsuccessful litigant that a constitutional question raised on a Petition for Rehearing was timely because the ruling of the state court was not anticipated.

An examination of the case discloses that it involved the question of whether a statute of Georgia contravened the due process law. The Court held that the Petitioner should have anticipated the ruling just as the Petitioner here should have known the law of Illinois as applied to the facts of its case and if it thought such law was

contrary to due process should have raised the question at an earlier time.

In this case the Petitioner has had ample opportunity to raise any and all questions long prior to the time when the denial of due process claim was raised. It filed an Answer to the Complaint in this case; (Record 28) Objections to the Master's Report; (Record 88-95) which were then argued before the Chancellor as (R 36) Exceptions to the Master's Report; Brief in the Appellate Court; a Petition for Rehearing; an Amended Petition for Rehearing; an Amendment to the Amended Petition for Rehearing; a Reply Brief (Appendix B to this brief being a copy of Appellate Court Docket) and then after the final decision in the Appellate Court, a Petition for Leave to Appeal to the Supreme Court. (Appendix C this brief) It was only *after* a denial of this Petition, which was the ninth opportunity for asserting its legal rights, and the final one permitted, under the rules of practice, that the Petitioner first raised a contention of denial of due process or equal protection.

The law which existed in 1953 at the time of entering into the contract, and in 1964 at the time of this trial is no different than the law in 1968, at the time this Petition is being presented.

We submit that the Complaint of the Petitioner as to abuse of his constitutional rights, if true, should have been asserted long prior to 1968 and that it is an imposition on the court to assert them at this time. *Bloeth* v. *State of New York,* 82 Supreme Court, 661.

CONCLUSION

Both of the parties to this litigation are artificial creatures, being municipal corporations in the State of Illinois, and as such they are separate entities from the citizens living within their boundaries and have no individual stockholders who will stand to profit or lose from the terms of this contract. In each village, however, are persons, living natural creatures both negro and caucasian, whose rights to one of the necessities of life, an adequate supply of water, is being interfered with by the stubbornness of the present officials of the petitioning village who insist on keeping the citizens of both villages limited in the water available to them by continuing to insist that a 12 inch water main planned to supply approximately 50% of the people which it is now trying to serve should continue to be the sole source of water supply for both villages.

It is submitted that far from interfering with constitutional rights, the effect of the Illinois court's decision was an emancipation of the citizens of these two villages from the shackles imposed on both by the difference between facts as they existed in 1953 and as they exist today.

The Court is requested to recognize the legal precedents of Illinois as applied to these facts and take prompt action to make it possible for the Village of Midlothian to plan an adequate supply of water for the citizens living in that village in 1968. This can be accomplished by a prompt denial of Robbins' Petition for Certiorari.

Respectfully submitted,

ELBERT F. ELMORE
ROBERT J. NOLAN

APPENDIX A

Illinois Revised Statutes, Chapter 110A, Sections 315 and 317:

315. (Supreme Court Rule 315). Leave to Appeal from the Appellate Court to the Supreme Court

(a) Petition for Leave to Appeal; Grounds. A petition for leave to appeal to the Supreme Court from the Appellate Court may be filed in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a matter of sound judicial discretion.

317. (Supreme Court Rule 317). Appeals from the Appellate Court to the Supreme Court as of Right

Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the constitution of the United States or of this state arises for the first time in and as a result of the action of the Appellate Court.

APPENDIX B

CLERK'S DOCKET AND FEE BOOK, APPELLATE COURT, FIRST DISTRICT, ILLINOIS

Term 19 No.
Term 19 No.
Term 19 No.

General No. 50849

ORAL 4th DIVISION

N. Cox, Ming & Black
Appellant's Attorney

Village of Hillsboro, a Ill. Mun. Corp. Appellee

vs.

Village of Robbins, an Ill. Mun. Corp. Appellant

Mid Prim Ors. No. 64CH 927
Mid Prim Judge Cornelius J. Harrington
Appeal from Circuit Court of Cook County

Robert F. Hanley & Robert J. Hanley
Appellee's Attorney

Praecipe or Notice for leave to appeal filed		19	Appearance filed	Oct. 8	1965
Writ of error issued		19	Additional record filed		19
Notice of granting leave to appeal issued		19	Additional abstracts and Notice filed	Dec. 5,	19 66
Motion for supersedeas filed		19	Briefs and Notice filed	Dec. 5,	1966
Supersedeas bond filed		19	Answer and Notice to petition filed		19
Supersedeas issued		19	Additional or reply briefs and Notice filed		19
Scire facias issued		19	Cross-errors filed		19
Scire facias returned	filed	19	Exhibits		19
Alias Scire facias issued		19	Judgment entered of record		19
Alias Scire facias returned	filed	19			19
Affidavit of non-resident filed		19			19
Notice for publication issued		19			19
Notice of filing Record	filed	Sept. 23, 19 65	Docket fee paid by	Date	$
Certificate of publication filed		19	Appearance fee paid by Appellee	Date 10/7/65	$ 15.00
2nd Record, cover-and-leaves filed		Sept. 24, 19 65	For appellant's transcript from court below		$
Additional record filed		19	For appellee's transcript from court below		$
Petition and Notice for leave to appeal filed		19	For printing abstracts for appellants		$
Abstracts and Notice filed		Nov 7 19 66	For printing abstracts for appellees		$
Briefs and Notice filed		Nov 7 1966	Sheriff's fees on scire facias		$
Additional or reply briefs and Notice filed		Dec 20 1966	Sheriff's fees on execution		$
			Printer's fees on publication		$
Exhibits		19			
Copy of opinion to Mr. Cox, Ming & Black		19	Copy of opinion to Robert F. Hanley		19

SEP 30 1965 Assigned to Fourth Division

Nov. 15/65 - 12 mo. appell. & cy. time to ... Dec. 5/65 & ... def. - Pltf ... the appeal ... allowed ... 30 days ... Defendant's ... Pltf ... the appeal.

July 7/66 Appeal dismissed

Jan 3 1966 Mo. appell for ... to file amended petition for rehearing allowed

Aug 1/66 Mo appell to file amendment to an amended petition for rehearing allowed

Oct. 7/66 On mo Appell abst & Blf to Dec. 5/66 is ordered by the Court that Appell file abst & Blf by Nov 7/66 Appellee file Brief by Dec 5/66 & Appell file reply Brief by Dec 20/66 allowed.

March 14/67 On mo Appellee to dismiss the appeal denied (see opinion)

March 14/67 Affirmed

Petition and petition for rehearing filed		19 66	Petition and petition for rehearing filed		19
Rehearing		19	Rehearing		19
Briefs on rehearing filed		19	Briefs on rehearing filed		19
Affdvt. of Int. for Lv. to appeal filed		19	Affdvt. of Int. for Lv. to appeal filed		19
Procedendo and order issued		19	Procedendo and order issued Nolan	Apr. 5	19 67
Execution No.	issued	19	Execution No.	issued	19
Alias Execution No.	issued	19	Alias Execution No.	issued	19
Certificate of filing pet. for leave to appeal to Sup. Ct. filed		19	Certificate of filing pet. for leave to appeal to Sup. Ct. filed		19
Appellate record to		19	Appellate record to		19
Court record to Supreme Court		19	Court record to Supreme Court		19
Order of Supreme Court		19	Order of Supreme Court		19

APPENDIX C

ON CERTIORARI FROM
THE SUPREME COURT OF ILLINOIS

Village of Midlothian, a municipal corporation, Respondent No. 40653 vs. Village of Robbins, a municipal corporation, Petitioner	Petition for Leave to Appeal from Appellate Court First District 50849

INDEX OF DOCUMENTS TRANSMITTED TO THE SUPREME COURT OF THE UNITED STATES

1. Petition for leave to appeal filed May 5, 1967.
2. Motion by respondent that petition for leave to appeal be dismissed filed May 10, 1967.
3. Objections to the motion by respondent that petition for leave to appeal be dismissed filed May 12, 1967.
4. Order entered May 18, 1967, denying the motion by respondent that petition for leave to appeal be dismissed.
5. Order filed May 25, 1967, ordering that respondent may file an answer to petition for leave to appeal on or before June 5, 1967, etc.
6. Answer to petition for leave to appeal filed June 5, 1967.
7. Mandate of the Supreme Court denying petition for leave to appeal September 26, 1967, issued on October 18, 1967.

8. Motion by petitioner for reconsideration of order denying petition for leave to appeal filed October 17, 1967.

9. Order entered November 15, 1967, denying the motion by petitioner for reconsideration of order denying petition for leave to appeal.

10. Certification.